

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CITY OF PROVIDENCE, *et al.*,

Plaintiffs,

v.

WILLIAM P. BARR, *et al.*,

Defendants,

Civil Action No.
CA-18-437-JJM-LDA

**DEFENDANTS' UNOPPOSED MOTION FOR PARTIAL RECONSIDERATION
WITH RESPECT TO ONE ASPECT OF THIS COURT'S JUNE 10, 2019 ORDER**

In accordance with this Court's direction in its June 10, 2019 Memorandum and Order (the "Order"), the parties have conferred with respect to a proposed form of permanent injunction as it relates to fiscal year 2017 Byrne JAG grants and have now agreed on the text of such an Order, which is being submitted contemporaneously for the Court's review. We believe that this proposal fully reflects the scope of relief ordered by the Court on June 10, 2019, in both the Court's oral pronouncements from the Bench and its subsequent written Order, with one exception, discussed below. That exception is the basis for this limited, and unopposed, request for reconsideration. The proposed Order also contains language that provides for formal entry of partial judgment with respect to the FY2017 grant claims that are the subject of this Court's June 10th ruling.

A. Request for Limited Reconsideration With Respect to Grant Letter Re-Issuance.

Pursuant to Fed.R.Civ.P. 59(e) and 60(b), Defendants respectfully request that the Court reconsider and modify its decision in one limited respect. In its June 10, 2019 Order, this Court directed the Department to, *inter alia*, "reissue FY2017 award letters without the three challenged conditions." Order at 7. While the Department will, it goes without saying, fully abide by this Court's order not to *enforce* these conditions so long as that Order remains in effect, we are

concerned that reissuance of the grant awards without the challenged conditions raises two significant potential issues. First, and most importantly, removal of the challenged conditions could present a mootness issue threatening the Department's ability to obtain appellate review of this Court's decision; and, second, were the Department to secure relief following such review, it could impair the Department's ability to enforce grant conditions.

When the Office of Justice Programs issues a grant award, it transmits award documents setting forth the conditions that govern the award (e.g., Dkt. No. 20-3). Those documents govern the award like a contract, and only conditions that are included in the award notice can be enforced. As the Court noted both at oral argument and in its Order, other district courts have enjoined the subject grant conditions. The Government has appealed the injunctions in all of those cases. In order to preserve the Government's rights on appeal, the orders in those cases have proscribed "using" or "enforcing" the conditions, and the Office of Justice Programs ("OJP") has accordingly issued award documents containing the text of the challenged conditions but with an acknowledgement that – as a result of a severability condition included in all Byrne JAG awards¹ – the conditions are not an enforceable part of the award so long as they are unenforceable under a binding court order. Here, if the subject conditions are not included in the 2017 award documents, OJP would be unable to enforce the conditions even if the Department were to prevail on appeal. Defendants respectfully submit that a similar approach is appropriate in this case.

B. The Requested Reconsideration Comports With Other Byrne JAG Grant Cases

We note in this regard that the requested modification is similar to relief granted, under nearly identical circumstances, by at least two other district courts reviewing challenges to Byrne

¹ See, e.g., Dkt. No. 20-3 at P051, ¶ 2 ("Should any provision of a requirement of this award be held to be invalid or unenforceable by its terms, that provision shall first be applied with a limited construction so as to give it the maximum effect permitted by law. Should it be held, instead, that the provision is utterly invalid or -unenforceable, such provision shall be deemed severable from this award.").

JAG grant conditions, including the Southern District of New York in *City of New York v. Whitaker, et al.*, 18-Civ.-6475-ER (S.D.N.Y.) (Dkt. Nos. 82-87) (granting requested modification) and the Northern District of California in *California ex rel. Becerra v. Sessions, et al.*, No. 3:17-cv-04701 (N.D. Cal). In both *City of New York* and *Becerra*, the district court initially ordered that OJP re-issue FY 2017 Byrne JAG award documents and omit the text containing the challenged conditions. *See Becerra*, Judgment and Order, at 3 (Dkt. No. 138) (ordering issuance of the “fiscal year 2017 JAG awards, without the enjoined conditions”); *City of New York* (Dkt. No. 81).

The Department moved to modify those orders to remove this requirement, however, for the same reasons noted above, notably the potential impact on Defendants’ ability to meaningfully exercise their appellate rights. *See Becerra*, Notice of Motion and Motion to Alter or Amend Judgment and Order, at 3-4 (Docket Entry No. 139); *City of New York* (Request for Pre-Motion Conf. and Order (Dkt. Nos. 82-87)). Both district courts ultimately agreed and granted a similar modification as the one requested here. *See Becerra*, Amended Judgment and Order, at 3 (Dkt. No. 154) (ordering the issuance of the “fiscal year 2017 JAG awards, without enforcement of the enjoined conditions”); *City of New York* (Dkt. No. 87 (amending order to provide for non-enforcement rather than re-issuance without conditions)).

Finally, we note that this modification would be consistent with the relief granted in the first instance in other cases challenging the immigration-related grant conditions, each of which prohibits “using” or “enforcing” the conditions, but do not prohibit including them in the award documents. Specifically, the final judgment in *Philadelphia v. Sessions*, No. 2:17-cv-03894-MMB (E.D. Pa.), states that “the Department of Justice is enjoined from enforcing the Advance Notification Condition, the Jail Access Condition, and the Section 1373 Condition on

Philadelphia's receipt of funding under the Byrne JAG Program for FY 2017, regardless of whether those conditions are included in the City's FY 2017 award documents." *Id.*, Dkt. No. 144, Ex. D. And the final judgment in *Chicago v. Sessions*, No. 1:17-cv-05720 (N.D. Ill.), states that defendants are enjoined from "using the Conditions in any FY 2017 Byrne JAG award document, delaying the processing or approval of a recipient's requests to draw upon the FY 2017 Byrne JAG funds based on the Conditions, and enforcing the Conditions against FY 2017 Byrne JAG recipients, regardless of whether those Conditions appeared in FY 2017 Byrne JAG award documents." *Id.*, Dkt. No. 144, Ex. E.

Defendants have conferred with the Cities' regarding this request for limited reconsideration, and they have indicated that they do not oppose Defendants' application; the proposal is accordingly embodied in the draft order proposed by the parties, which additionally permits the Cities to accept grant funds with an annotation reflecting that they do not accede to the challenged conditions and that those conditions have been held unenforceable by Order of this Court, and further provides that these conditions will not be applied to or enforced against the recipients so long as this Court's Order remains in effect. We accordingly respectfully request that the Court modify its June 10, 2019 Order in this limited respect, so as to preclude enforcement of the challenged conditions so long as this Court's Order is in effect, but not to require re-issuance of award notices that lack the conditions, and endorse the parties' proposed injunction, which embodies that proposed change.

Dated: June 24, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June 24, 2019, I caused the foregoing documents to be filed by means of this Court's Electronic Case Filing (ECF) system, thereby serving it upon all registered users in accordance with Federal Rules of Civil Procedure 5(b)(2)(E) and 5(b)(3) and Local Rules Gen 304 and 305.

Dated: June 24, 2019

By: /s/ Zachary A. Cunha
Zachary A. Cunha
Assistant United States Attorney

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PARTIAL JUDGMENT OF INJUNCTION AND WRIT OF MANDAMUS

Pursuant to, and for the reasons set forth in, this Court’s Memorandum and Order of June 10, 2019 (Docket No. 30), granting the City of Providence and the City of Central Falls’ (the “Cities”) Motion for Summary Judgment (Docket No. 20) and application for a Writ of Mandamus, with respect to the Fiscal Year 2017 Edward Byrne Memorial Justice Assistance Grant (“Byrne JAG”) award claims at issue in this litigation, it is ORDERED, ADJUDGED, and DECREED as follows:

1. With respect to any Byrne JAG award for Fiscal Year 2017 (a “FY2017 Award”) made to any recipient within the District of Rhode Island, the Department of Justice (“DOJ”) is permanently enjoined from enforcing any special condition on a recipient’s FY2017 Award that imposes or requires any of the following (the “Enjoined Conditions”) as a condition of eligibility for, or receipt of, FY 2017 Byrne JAG award funds:
 - a. That a Byrne JAG award recipient provide federal immigration enforcement agents with access to the recipient’s correctional facilities (the “Access Condition”);
 - b. That a Byrne JAG award recipient provide federal immigration enforcement agents with notice of a scheduled release of a suspected alien in custody (the “Notice Condition”); and
 - c. That a Byrne JAG award recipient not restrict, in contravention of 8 U.S.C. §1373(a), the sharing, maintenance, or exchange of information regarding citizenship or immigration status with federal immigration enforcement authorities (the “1373 Condition”);
2. DOJ is mandated to disburse the Cities’ FY2017 Awards, specifically:

Award No.	Award Recipient	Grant Award Amt.
2017-DJ-BX-0398	City of Providence	\$212,112.00
2017-DJ-BX-0951	City of Central Falls	\$28,677.00

These disbursements shall be made despite the Cities' failure to certify compliance with the Access Condition, the Notice Condition, or the 1373 Condition as set forth in the award documents for the Cities' FY2017 Awards; provided, however, that nothing in this Order shall relieve the Cities' from their obligations to provide certification of, and compliance with, any other condition of the Cities' FY2017 Awards other than the Enjoined Conditions, and DOJ is not required to disburse the Cities' FY2017 Awards until such other conditions for disbursement are met. Acceptance of FY2017 Award funds by the Cities shall not be construed as acceptance of the Enjoined Conditions;

3. In their acceptance of the FY2017, the Cities may include notations or additional pages indicating that they are not certifying compliance with the Access Condition, the Notice Condition, and the 1373 Condition so long as this Court's Order remains in effect;
4. DOJ must process and approve the Cities' requests for drawdowns of their respective FY 2017 Byrne JAG funds as it would in the ordinary course and without regard to the Enjoined Conditions.
5. Nothing in this Order shall impair, affect, or relieve the Cities or any other FY2017 Byrne JAG award recipient within the District of Rhode Island from the obligation to certify and comply with any and all other grant conditions apart from the Access Condition, the Notice Condition, and the Section 1373 Condition, nor shall it impair DOJ's ability to enforce the conditions in the Cities' FY 2017 Awards other than the Access Condition, the Notice Condition, and the Section 1373 Condition;
6. The Cities' rights to seek reasonable costs, including attorneys' fees, for this matter and any future related proceedings, are reserved.
7. Because the Cities have demonstrated a need for the funds contained in the FY2017 Award, and because this Court's resolution of the remaining issues in this case is unlikely to affect the FY2017 Award, the Court hereby finds that there is no just reason to delay entry of partial judgment. Pursuant to Federal Rule of Civil Procedure 54(b), judgment shall enter forthwith in favor of the Cities with respect to their claims concerning the FY2017 Awards.

SO ORDERED:

JUNE ____, 2019

HON. JOHN J. McCONNELL, Jr.
UNITED STATES DISTRICT JUDGE